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IN THE COURT OF APPEALS OF INDIANA

DUSTY W. RHODES,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 87A01-0807-CV-312
	)	
TRACIE M. RHODES,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE WARRICK CIRCUIT COURT
The Honorable David O. Kelley, Judge
Cause No. 87C01-0703-DR-167

January 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Dusty Rhodes appeals the trial court's distribution of property pursuant to its dissolution of marriage decree. For our review, Dusty raises three issues, which we consolidate and restate as whether the trial court abused its discretion by including in the marital estate funds that Dusty received as attorney-in-fact for his father, Leon Rhodes. Concluding that the trial court abused its discretion, we reverse and remand.

Facts and Procedural History

Dusty and Tracie Rhodes were married on May 30, 1998. In the summer of 2006, Dusty travelled to Arizona to assist with the sale of Leon's residence. Prior to Dusty's departure, Tracie, who had previously worked as a legal secretary, prepared a power-of-attorney form for Dusty and Leon. Leon executed a durable power of attorney using the form on July 10, 2006, naming Dusty as his attorney-in-fact and granting Dusty authority to act on his behalf with respect to, inter alia: real estate transactions; bond, share and commodity transactions; banking transactions; "[g]ifts to charities and individuals other than [Dusty]"; and giving "[f]ull and unqualified authority to [Dusty] to delegate any or all of the foregoing powers to any person or persons whom [Dusty] shall select". Appellant's Appendix at 22. The power of attorney also stipulates that Dusty "agrees to act and perform in said fiduciary capacity consistent with [Leon's] best interests as [Dusty] … in … [Dusty's] best discretion deems advisable …." Id.

Dusty successfully sold Leon's residence for a profit of $102,000. These funds were paid directly to Dusty by Chase Bank pursuant to a second durable power of attorney

executed by Leon granting Dusty authority over Leon's accounts as his attorney-in-fact. On September 11, 2006, Dusty received a check made payable to "DUSTY RHODES" for $102,000. Id. at 25. Dusty then met with a financial advisor, Mark Powers, regarding the investment of the funds. On September 19, 2006, Dusty and Tracie met with Powers, and Dusty opened an account with Ameriprise Financial in his own name and deposited the $102,000 check. Shortly thereafter, Dusty named Tracie as the primary beneficiary on the account. Neither Dusty nor Tracie made any other deposits into the account or withdrawals from the account. After Tracie filed for divorce, Dusty removed Tracie as the primary beneficiary and substituted his mother, Leon's ex-wife, and his step-brother, who has no relation to Leon.

On March 26, 2007, Tracie filed a petition for dissolution of marriage. The trial court held a final hearing on March 27, 2008 and issued its decree of dissolution on June 3, 2008. With respect to the investment account, the trial court found:

> In September of 2006, [Dusty] received $102,000.00 from his Father. With earned interest, this account had a balance of $123,275.00 at the time of the final hearing. The Court has reviewed the guidance of IC 31-15-7-5 and the evidence from the final hearing. In particular, the Court finds [the Powers letter] to be most convincing that the parties viewed the "ownership" of these funds as family funds for the future of the family. It is the Court's opinion that these funds must be included in the marital estate and distributed accordingly.

Id. at 11. The trial court then ordered Dusty to use funds from the investment account to pay $9,134.81 toward the couple's debts and $33,000 directly to Tracie "to realize the equal distribution requirements of the Indiana Code." Id. Dusty now appeals.

Discussion and Decision

I. Standard of Review

The distribution of marital property is committed to the sound discretion of the trial court. Breeden v. Breeden, 678 N.E.2d 423, 427 (Ind. Ct. App. 1997). Therefore, we review such decisions only for an abuse of discretion and will reverse only if the judgment is clearly against the logic and effect of the facts and the reliable inferences to be drawn from those facts. Leonard v. Leonard, 877 N.E.2d 896, 900 (Ind. Ct. App. 2007). When, as here, the trial court enters special findings, we review the judgment by determining, first, whether the evidence supports the findings and, second, whether the findings support the judgment. Webb v. Webb, 868 N.E.2d 589, 592 (Ind. Ct. App. 2007). We may not reweigh the evidence or assess the credibility of witnesses, and we consider only the evidence most favorable to the trial court's disposition of the marital property. Leonard, 877 N.E.2d at 900. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. Webb, 868 N.E.2d at 592.

II. Inclusion of Investment Account in Marital Estate

The trial court shall divide the property of the parties, whether: owned by either spouse before the marriage; acquired by either spouse in his or her own right after the marriage and before the final separation of the parties; or acquired by their joint efforts. Ind. Code § 31-15-7-4(a). However, the trial court may not award property that is not owned by the parties. Moore v. Moore, 482 N.E.2d 1176, 1179 (Ind. Ct. App. 1985). For Dusty to have acquired the funds, he must have taken ownership of them in his own right, and not as

attorney-in-fact for Leon, or Leon must have given the funds to Dusty as a gift.

A. Power of Attorney

Leon executed a power of attorney granting Dusty the authority to act on his behalf. The power of attorney authorizes Dusty to: sell an interest in real property and receive the proceeds of the sale, Ind. Code § 30-5-5-2(a)(2) and (6) (listing specific acts authorized by a general grant of authority to engage in real estate transactions); buy or otherwise acquire ownership of a bond, a share, or an instrument of similar character or employ a broker to do the same, Ind. Code § 30-5-5-4(a)(1) and (8) (listing specific acts authorized by a general grant of authority to engage in bond, share, and commodity transactions); and open in the name of the principal alone, or in a way that clearly evidences the principal and attorney-in-fact relationship, a deposit account with a brokerage firm, Ind. Code § 30-5-5-5(a)(2) (listing specific acts authorized by a general grant of authority to engage in banking transactions). The actions taken by Dusty in selling Leon's home, receiving the proceeds, investing the proceeds, and employing Powers to manage the investment are consistent with his authority under the power of attorney. Therefore, those actions alone do not provide evidence that Dusty owned the $102,000. The only evidence that Dusty exceeded his authority as attorney-in-fact is that he opened the investment account in his own name only rather than complying with Indiana Code section 30-5-5-5(a)(2), which requires him to open accounts in Leon's name or in a way clearly evidencing his role as attorney-in-fact. However, despite Dusty's failure to correctly title the account, there is no evidence that Dusty believed he owned the funds, attempted to withdraw funds for personal use, or comingled personal funds with the

account.

Additionally, in exercising his authority, Dusty has a duty to "use due care to act for the benefit of the principal under the terms of the power of attorney," Ind. Code § 30-5-6-2, and to "exercise all powers granted under the power of attorney in a fiduciary capacity," Ind. Code § 30-5-6-3. Assuming that Dusty held the $102,000 as attorney-in-fact for Leon, any personal use or claim of ownership over the funds by Dusty would breach his fiduciary duty. There is no evidence that Dusty intended to breach his fiduciary duty with respect to the funds. On the contrary, there was testimony from multiple witnesses that Dusty viewed the money as belonging to Leon. Further, Dusty made no attempt to withdraw funds from the investment account for personal use or to comingle his personal funds with the investment account.

B. Gift

Tracie testified that the funds were intended as a gift to the family. However, there is no evidence in the record to support the elements of an inter vivos gift from Leon to Dusty or his family. A valid inter vivos gift occurs when each of the following is present: (1) the donor is competent to make the gift; (2) the donor intends to make a gift; (3) the gift is completed with nothing left undone; (4) the property is delivered by the donor and is accepted by the donee; and (5) the gift is immediate and absolute. Fowler v. Perry, 830 N.E.2d 97, 105 (Ind. Ct. App. 2005). Here, there is no evidence of delivery by Leon to Dusty because Dusty received the funds directly from the sale of the home as attorney-in-fact for

Leon.[1] Additionally, there is no evidence of acceptance of the gift because Dusty repeatedly stated the funds belonged to Leon and he was only holding them for safekeeping. Neither Dusty nor Tracie attempted to use the funds, nor did they treat the funds as their own by comingling them with personal or family funds. Further, a gift of this size would require the payment of a federal gift tax, see 26 U.S.C. § 2501 et seq.; however, there is no evidence of a gift tax return being filed or of the payment of a gift tax.

Although the power of attorney grants Dusty the power to make gifts from the funds, it prohibits him from making a gift to himself. Dusty is also prevented by statute from making a gift from the funds to his family in excess of $12,000. See Ind. Code § 30-5-5-9. Thus, Dusty, acting as attorney-in-fact, was incapable, absent a breach of fiduciary duty, of gifting the funds to himself or to his family on behalf of Leon. Therefore, the evidence does not support a finding that Leon gave the funds to Dusty as a gift.

The trial court points to the letter from Powers as "most convincing that the parties viewed the 'ownership' of these funds as family funds …." Appellant's App. at 11. However, the letter is only evidence of Powers's understanding of the situation and description of the meeting. The letter recounts advice given by Powers to Dusty and Tracie regarding investment alternatives, asset allocation and portfolio theory, the "pros and cons of

[1] While Dusty would not be required to surrender possession of the funds back to Leon to be re-delivered to him to meet the element of delivery, there must be some other act by Leon of relinquishing dominion and control over the funds or recognizing Dusty's ownership of the funds with his consent. See Tenbrook v. Brown, 17 Ind. 410, 413, 1861 WL 2977 at *4 (1861). Here there is no evidence of an intent by Leon other than that Dusty should hold the funds as his attorney-in-fact.

joint ownership and beneficiary arrangements," and personal estate planning. Appellant's App. at 26. The letter also states that Dusty will likely put the funds in his name alone, with Tracie as the primary beneficiary.[2] The letter contains no evidence of intent by Leon to gift the funds to Dusty and his family, delivery of the funds to Dusty by Leon, or acceptance of delivery by Dusty. Even accepting the trial court's finding that the letter is evidence that the parties viewed the ownership of these funds as family funds, such a belief by the parties, by itself, is insufficient to establish a gift of the funds from Leon to Dusty.

Further, the trial court's interpretation of the contents of the letter is directly contradicted by the testimony of its author. Powers testified in response to the question, "Any doubt in your mind that these funds were his dad's funds?" that "it was clys-crystal [sic] clear what he was asking." Transcript at 102. Powers repeatedly testified that he understood the money was in Dusty's hands, pursuant to the power of attorney, for safekeeping because of Leon's inability to manage his assets. Powers also testified that he designed the account for liquidity because of the possibility that money would have to be withdrawn sporadically when Leon needed it. Therefore, the evidence does not support the trial court's findings that Dusty and Tracie owned the funds.

Conclusion

The evidence does not support the trial court's finding that Dusty and Tracie owned

[2] Although the fact that Dusty made Tracie the primary beneficiary could be seen as evidence of his intent to either convert the funds to his personal use or to treat the funds as a gift to him from Leon, the evidence is contrary to this interpretation. Testimony from Dusty, Powers, and Dusty's mother demonstrates that, in listing first Tracie and subsequently his mother and step-brother as beneficiaries, Dusty made clear his

the funds in the investment account. Rather the evidence demonstrates that Dusty held those funds on behalf of Leon as his attorney-in-fact. As a result, the trial court abused its discretion when it included the funds in the marital pot and distributed them between the parties. Therefore, we remand to the trial court to distribute the parties' property in light of this opinion.

Reversed and remanded.

CRONE, J., and BROWN, J., concur.

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intention that the beneficiary should continue to use the funds for Leon's care in the event Dusty should die.